

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH

3 CENTRAL DIVISION

4
5 PETTER INVESTMENTS, a Michigan)

6 corporation doing business as)

7 Riveer,)

8 Plaintiff,)

9 vs.) CASE NO. 2:14-CV-45DB

10 HYDRO ENGINEERING, a Utah)

11 corporation, et al.,)

12 Defendants.)

13 _____)

14
15 BEFORE THE HONORABLE DEE BENSON

16 -----

17 April 29, 2015

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19 Motion Hearing

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A P P E A R A N C E S

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1 April 29, 2015

2:00 p.m.

2 P R O C E E D I N G S

3
4 THE COURT: Good afternoon.

5 Sorry to keep you waiting. Those criminal
6 hearings went longer than anticipated.

7 We're here in Petter Investments, Inc. versus
8 Hydro Engineering. The case number is 14-CV-45. Mr. Brett
9 Foster is here and Mr. Mark Miller representing the
10 defendants. Mr. Stephen Lobbin is here --

11 MR. LOBBIN: Good afternoon.

12 THE COURT: -- and Mr. Mark Ford representing the
13 plaintiff.

14 Who else is with you at counsel table?

15 MR. FORD: This is Jessica Garcia, Your Honor, one
16 of our paralegals.

17 THE COURT: Nice to have you here, Ms. Garcia.

18 What I have before me is the defendant's motion
19 for summary judgment on plaintiff's first claim for relief,
20 and I am not sure whether I'm also hearing the plaintiff's
21 motion requesting leave to serve its amended final
22 infringement contentions today. I just received the
23 opposition memorandum from the defendants. It came in
24 today, but it is dated 4-27-15.

25 What was your plan? What did you think we were

1 doing with regard to that motion here today, Mr. Lobbin?

2 MR. LOBBIN: Certainly, Your Honor, I can address
3 that. With regard to the other two motions that were
4 pending, in view of the Court's claim construction on those
5 two patents, we proposed to the defendants that we file a
6 joint motion requesting that the Court enter judgment on
7 those issues of noninfringement because the claim
8 construction issues, I think in both of our views, resolved
9 the issues on the motion. We are really here on the summary
10 judgment, and then I was going to get to the second --

11 THE COURT: You were going to get to my question
12 sooner or later.

13 MR. LOBBIN: Yeah.

14 THE COURT: I know we're not here on the
15 second and third --

16 MR. LOBBIN: I thought you had mentioned that
17 before. The opposition was in opposition to a motion for
18 leave for us to file and serve our amended --

19 THE COURT: Right.

20 MR. LOBBIN: -- infringement contentions under the
21 local rule.

22 THE COURT: Were you planning on having argument
23 on that here today?

24 MR. LOBBIN: We can. We could, but --

25 THE COURT: What did you understand? Was that

1 going to be heard today as well? What was your
2 understanding?

3 MR. MILLER: I am prepared to argue it too, if we
4 want to talk about it.

5 THE COURT: Well, if someone tells me they are
6 surprised, then I won't hear it today. But if you're ready
7 to advance your arguments, I will be happy to do it all
8 today.

9 MR. LOBBIN: I guess given that, I probably want
10 to defer just because we also got the opposition, so I have
11 not fully digested that.

12 THE COURT: We'll defer on that motion.

13 I'm only here today to hear argument on the
14 defendant's second motion for summary judgment on
15 plaintiff's first claim for relief.

16 Mr. Miller. I forgot to recognize your --

17 MR. MILLER: This is Sherry Stucki, our paralegal.

18 THE COURT: Nice to have you here.

19 Mr. Miller, are you ready to go?

20 MR. MILLER: I am.

21 Can you bring up 8624 when you're ready?

22 Your Honor, in addressing this motion, the
23 critical pieces of evidence that need to be focused on are
24 claim one, Riveer's infringement contentions, and the
25 Court's claim construction. Those three pieces of evidence

1 are all you need to decide whether they have any grounds to
2 push this case to trial on claim one or on the 298 patent.

3 Blow up claim one, Sherry. It is in that second
4 column there.

5 If you look at claim one, the three claim elements
6 I'm going to talk about in my argument today are the frame
7 elements, including the bottom surface, and then the grate
8 elements. So frame, bottom, surface and grate. If you look
9 at that clause that talks about the frame, and I'm sure that
10 we have all read this a million times, but you have got four
11 walls, and then you have a bottom surface that extends
12 between those walls, and why it extends between the walls is
13 to define a basin for collecting water. So in order to
14 infringe, you have to have a product that has a basin that
15 is made from the four walls and a bottom surface. It is
16 very simple.

17 Now go to my presentation slides. Let's go to the
18 next slide, Sherry.

19 If you start with the frame, there is that frame
20 clause from the patent claim. The Court's claim
21 construction puts in the following information that the four
22 connected walls define an enclosed area, and there is an
23 inner surface facing the inside and the outer surface facing
24 the outside.

25 Next slide, Sherry.

1 Now, if you look at their infringement
2 contentions, the leader lines from number two are what
3 Riveer used in their infringement contentions to identify
4 and to give Hydro notice of what they are calling the four
5 frame walls. What they identified was those walls of the
6 trough, and they also identified next to it that front wall
7 of the pad in that next drawing. That is what they told us
8 are their infringement contentions.

9 So if you go to the next slide and if you look
10 here, based on these infringement contentions, if you were
11 to take those walls that they identify as the four walls,
12 and look at them from the top, and you see in this upper
13 corner here you have this red shape, and that would be the
14 shape of the walls they identified in their infringement
15 contentions. You have the side trough right there enclosed
16 and then that front wall.

17 Now, these four walls are not weight bearing. The
18 side gutter walls are not weight bearing. That outer wall
19 of the side gutter does not bear any of the weight of the
20 vehicle being washed. Not all of them have the inner and
21 outer surfaces. You do have a defined enclosed area there
22 in the trough, but you don't have a single defined enclosed
23 area with inner and outer surfaces of each wall.

24 Go to the next one, Sherry.

25 In their infringement contentions they also make a

1 reference, and it is kind of this vague reference where they
2 say see also, and they identify these documents in the
3 production, and they identify this document that has inner
4 channels.

5 Go to the next one, Sherry.

6 They identify this document.

7 Then the next one, Sherry.

8 They identify this document where they show all of
9 the different beams and stuff as the frame, but they never
10 point to any of these as the four walls. They just say see
11 also these documents that show I guess that Hydro's product
12 has a lot of frame beams, but they don't give any context or
13 give any clarity other than element two where they actually
14 point to specific walls, and those are the walls that they
15 claim in their infringement contentions.

16 Go to the next one, Sherry. I want to jump ahead,
17 Sherry, to page 12 of the presentation. Is that 12? There
18 we go.

19 Now let's talk about the bottom surface. We have
20 got those walls that they point to in their infringement
21 contentions. The bottom surface has to fill the area
22 enclosed by the four walls, and to define a basin for
23 collecting water, right?

24 Go to the next slide, Sherry.

25 They point to the little grooves in the top of the

1 Hydropad, and that number three is the bottom surface in
2 their infringement contentions, and they claim that the
3 little grooves in that corrugated top constitute the bottom
4 surface. The problem with that is that bottom surface does
5 not extend between the frame walls to form a basin with
6 those frame walls. It is on top of the frame walls. It
7 does not even extend in the area defined by the four walls
8 they point to. It does not extend between the side trough
9 walls.

10 Each one of those tiny little surfaces -- it is
11 quite a reach to try and call that a basin or a bottom
12 surface that could meet all the limitations in the claim,
13 even without the Court's claim construction. Just looking
14 at that language in the claim, how can that possibly be the
15 bottom surface extending between the walls to form a basin,
16 each one of those grooves? It makes no sense there.

17 Go to the next one, Sherry.

18 This shows that it does not satisfy either the
19 plain language of the claim, without construction, and it
20 does not satisfy the Court's claim construction either.

21 The next one, Sherry.

22 This is their proposed new amendment, and I guess
23 if we are not going to go into that, we will skip that
24 slide.

25 Let's go to the next one, Sherry.

1 Petter did try and present doctrine of equivalents
2 through their expert witness in the summary judgment
3 briefing, but the only thing Dr. Paulus says is, he just
4 says that, well, you have got these grooved portions and he
5 just says they perform the claimed function of defining a
6 basin for collecting water in the same way as shown to
7 achieve the same result. He just says it.

8 The problem is, and we have put a lot of case law
9 into our arguments, and I want to point out that a lot of
10 our information on Dr. Paulus and why his testimony is not
11 relevant or not reliable and can't create an issue of fact
12 is in docket number 217. That is a reply brief from one of
13 the other summary judgment motions. It was incorporated by
14 reference in the reply brief for this motion. I just want
15 to point out that a lot of our arguments relevant to Dr.
16 Paulus for this motion are incorporated from docket 217.

17 There are all these reasons that we list here in
18 this slide why his testimony can't create a genuine issue of
19 fact. He is a Ph.D. in mechanical engineering, but the only
20 thing they do is they hire him to state their legal
21 arguments or invoke the standard of same function, way,
22 result. But invoking the standard does not satisfy the
23 standard. If you slap a Ph.D. on your arguments, it does
24 not transform them into actual evidence that would preclude
25 a finding of summary judgment. That is all that he does.

1 He is very conclusory. He does not offer any
2 actual technical or engineering help. He does not talk
3 about fluid dynamics or anything that is complex to try to
4 give clarity on an engineering principle or a principle of
5 physics. He basically performs the same function that a
6 fact finder would perform. Look at this very simple
7 structural apparatus and compare it to the claims as
8 construed. That is not the function of an expert witness.
9 He is not helpful and he is not specific. He is conclusory
10 and he does not qualify as a person of ordinary skill in
11 this art. He has no experience in the wash pad industry, so
12 he can't have any foundation for saying what somebody in
13 this field would consider to be this type of a claim
14 limitation or context to the claim.

15 For all those reasons, Dr. Paulus's testimony does
16 not get them anywhere close to stating a prima facie case of
17 the doctrine of equivalents.

18 Let's go to the next slide, Sherry.

19 The differences are pretty clear on the bottom
20 surface. If you look here, you have got the 298 system and
21 you have a grate, and we all know how the patented system
22 works. The car is parked on the grate and the water falls
23 through. It goes into the basin below. That basin is
24 created by the frame walls and the bottom surface. In
25 Hydro's system you don't have a grate. They call it a

1 grate. They call number 4 a grate, those upper surfaces,
2 and that is their infringement contentions, and then these
3 bottom surfaces don't come anywhere close to satisfying the
4 Court's claim limitations and neither does the grate. It is
5 not porous. It is a solid piece of steel.

6 The next one, Sherry.

7 As far as what they have presented through Dr.
8 Paulus on the doctrine of equivalents, the impervious top
9 channels and grooves, and that is what they want to call the
10 bottom surface, and those are just those grooves that go
11 through, and those impervious grooves in the impervious top,
12 they perform the function of directing water and debris
13 across the washing surface to a side trough. That is what
14 those so.

15 That is not the function of the bottom surface and
16 basin of the claimed invention. The bottom surface of the
17 claimed invention collects the water and debris. It
18 collects it so that it can later be sucked out through a
19 drainage fitting.

20 Sherry, go back to A-624, claim one, and blow up
21 claim one.

22 You'll see that claim one also has this limitation
23 down a few lines that says there is a drainage fitting that
24 is attached to the outer surface of one of the walls, so to
25 allow water collected in the basin to flow out through the

1 drainage fitting, right? Well, if these grooves in the
2 impervious top are supposed to be the basin, there is no
3 drainage fitting attached anywhere near those grooves to
4 allow water to flow out of them.

5 Water flows through those grooves by gravity, not
6 by a pump. If you go down two more, a few more, it says
7 there is a pump for causing water to flow from the basin.
8 There is no pump pulling water from those grooves. There is
9 no drainage fitting that the water goes through from those
10 grooves. The drainage fitting, and there is none, and that
11 is why you can't view the grooves in the impervious top to
12 be a basin. That is why, if you go back to that slide we
13 were on in my presentation, Sherry, that is why you don't
14 satisfy the function. It is substantially different.

15 Those grooves in the top channel do not collect
16 water and debris that can later be sucked out through a pump
17 through a drainage fitting. Okay. It does not perform in
18 the same way. The channels and grooves in the Hydropad,
19 they are an integral part of the corrugated washing surface.
20 They reside above the frame walls, above, but they don't
21 combine with the frame walls to form a basin below the
22 washing surface. They don't intersect with the frame walls
23 to form a basin. They don't do it in the same way.

24 Next slide, Sherry.

25 This is where we get to grate. Now, grate is very

1 simple and the Court's claim construction says a grate is
2 porous. This is a very simple dichotomy, and we have put in
3 the briefing the difference between Riveer's wash pad
4 invention and Hydro's wash pad inventions, and one was the
5 grate over a basin and one was an impervious top with a side
6 trough. It really is that simple.

7 Next slide, Sherry.

8 What they call the grate, is they want to dissect
9 the components of Hydro's wash pad and say, well, we are
10 just going to say the very top ridges of our corrugated,
11 impervious surface is the grate, and apparently they are
12 going to say that that is a porous grate but it is not. We
13 have a solid piece of corrugated steel that is not porous.
14 Nothing can flow through it. It lands on top and it flows
15 across to a side trough.

16 Next one, Sherry.

17 What they point to as the grate on Hydro's wash
18 pad is not a porous framework. It does not fill the
19 horizontal cross section of the enclosed area of the walls
20 that they define as the frame walls. It does not engage the
21 top portion of the inner surfaces of all four frame walls as
22 the claim requires.

23 Next one, Sherry. We'll skip this one, too.

24 Dr. Paulus gave the same conclusory testimony on
25 the doctrine of equivalents here. He just said that the

1 upper portions of the grating perform the same claimed
2 function, and then he just quotes the function in the claim,
3 in the same way to achieve the same result, again, invoking
4 the standard of the law, as if that satisfies their burden
5 to prove the standard.

6 Really that is all they have ever done, and here
7 we are this late in the case, and we are way past the notice
8 pleading stage, and they don't get to just have somebody say
9 this performs the same function the same way with the same
10 result and then claim that they have raised a genuine issue
11 of fact.

12 I want to go through how on the grate -- go two
13 ahead. Go to 25. Skip two ahead.

14 They can't satisfy the doctrine of equivalents for
15 this claim limitation no matter how hard they try. The
16 Hydropad has an impervious top surface. What is the
17 function and way that this operates? For theirs on the
18 left-hand side there you see a porous grate over a basin and
19 that is the claim. The water falls through it into the
20 basin. If you look at ours on the right-hand side, it flows
21 across. Ours does not support the vehicle above the basin
22 that collects the water. It supports the vehicle to the
23 side of the collection trough. Those are different.

24 Go to the next one, Sherry.

25 Here is another difference. Our product directs

1 the water across. We don't allow the water to fall through
2 the washing surface into a basin below.

3 Next one, Sherry.

4 Here is the result. This is a result that was
5 highlighted in Hydro's patent applications when they got the
6 patent on their impervious topside trough and it is this.
7 We permit access to wherever the water and debris is being
8 stored, and you can access that to clean it out without
9 removing the washing surface, without taking the car off the
10 wash pad and without even stopping the washing process. Our
11 patent actually says in prior systems, and they cite to
12 Riveer's patent, and they say in prior systems you couldn't
13 do that. Everything fell through the grate. When you start
14 collecting mud and debris under there, you have to lift up
15 the grate to access that, which means the car can't be on
16 there, and it means you can't have the washing process going
17 on while you're accessing that basin.

18 That is one of the differences. You can't say,
19 and there is no evidence in this case to support the idea,
20 that our product performs any of these claim limitations the
21 same way to get the same result or even performs the same
22 functions.

23 Sherry, bring up the video, their video that they
24 had at the tutorial.

25 If you remember, Your Honor, they brought this

1 video to the tutorial. Pause it there.

2 I suspect this thing that they built has something
3 to do with this video. I have never seen this before. I
4 got pictures of it last night. We have become accustomed to
5 being surprised in this case.

6 I want to go through this video and kind of show
7 how it relates to the claims in the Court's claim
8 construction and the doctrine of equivalents.

9 Go ahead and press play.

10 They made this video to show a wash pad that has
11 the basin, the water fills up, and then it is under there
12 and you have the wash surface, and this is the type of wash
13 surface that things fall straight through. Then it sucks it
14 out through a drainage fitting just like their claims,
15 right? That is just like their claims.

16 Then they want to go through a bunch of
17 modifications on this. Well, here is modification number
18 one. They want to bring that surface all the way up to the
19 top of the frame walls, and if you pause it right there,
20 Sherry, they bring that up to the top of the frame wall, and
21 that is the first modification that they simulate, and they
22 have now gone outside of the scope of their claims. That is
23 no longer a bottom surface that forms a basin with those
24 four sidewalls. It is not a basin according to the language
25 in the claims. It is now all the way at the top. It is not

1 a bottom surface, and so they have already taken it out of
2 the scope of the claims with that one modification.

3 Go ahead, Sherry.

4 Then they add this side trough. That is a
5 difference, too. Modification number one is this is not a
6 product covered by their claims. Modification number three,
7 and they keep making some, and they take the trough away and
8 they pull it out. This does not actually simulate any
9 actual product in the case, and there should be a green wall
10 on the inside of that trough and the water does not fill up
11 from the bottom magically, but this too is not a product
12 covered by their claims. That surface above, that red
13 surface is not a bottom surface that forms a basin.

14 Then they go through a further modification and
15 they pull all of those rails up and they get a solid piece
16 of impervious, nonporous, corrugated steel and put that on
17 there, and now they are even further away from their claims.

18 What is amazing is that they feel that this
19 illustrates the scope of their claims. No matter how many
20 changes you make to your wash pad, no matter how far away
21 you get, how many different patents you get on your design,
22 and no matter how many differences you make, if you wash
23 something on it and the water is stored somewhere, according
24 to Riveer you infringe their patent. Their patent can
25 stretch as far as any wash pad that you wash something on

1 and water gets stored. This illustrates perfectly why their
2 claim ends with that first modification, and perfectly why
3 they can't claim infringement of the Hydropad either
4 literally or the doctrine of equivalents.

5 That is all that I have.

6 THE COURT: Thank you, Mr. Miller.

7 Mr. Lobbin.

8 MR. LOBBIN: Thank you, Your Honor. Good
9 afternoon.

10 May it please the Court, certainly Mr. Miller
11 makes many arguments, and obviously we have our positions,
12 and that is kind of the purpose of summary judgment in our
13 view to not resolve legal arguments and disputes over the
14 minutia of what a jury is entitled to consider when they
15 consider infringement. The jury is going to have the claims
16 in front of them. They are going to have this Court's
17 interpretation of those claims, an elaboration on what those
18 claims mean, and they are going to have the products
19 themselves, the accused infringing products, and they are
20 entitled to consider the opinions of one of ordinary skill
21 in the art.

22 Mr. Miller contends that, well, the only people
23 who can talk about these patents and who qualify as one of
24 ordinary skill in the art would be somebody who designs wash
25 pads. We have Hydro and we have Riveer. Those are the only

1 games in town. I doubt if we presented one of our employees
2 as an expert, they probably wouldn't be as objective in the
3 view of this Court as it would be to present a Ph.D.
4 mechanical engineer who is certainly of ordinary skill, and
5 I would contend one of extraordinary skill in the art in
6 being able to describe the technology and function of these
7 types of products.

8 Summary judgment is not the place to exclude the
9 analysis and opinions of one of ordinary skill in the art
10 like Dr. Paulus. We didn't bring him here today like last
11 time, but we certainly have, in the record and in our
12 briefing and in the papers, his testimony which is at
13 length. There are some snippets crafted for Mr. Miller's
14 presentation, but his analysis is extensively longer.

15 Obviously I don't have to remind this Court that
16 at summary judgment we're trying to find whether a
17 reasonable jury, a reasonable jury is going to have a
18 legally sufficient evidentiary basis to find for the
19 nonmoving party here, and that is us. The nonmoving party
20 is entitled to present evidence in opposition to a summary
21 judgment motion, and have that evidence considered in the
22 light most favorable to it, Riveer. We're entitled to not
23 have the Court or anyone else cast aspersions on the
24 credibility of Dr. Paulus. Certainly we believe he is
25 qualified and we believe he is credible and his analysis

1 shows that.

2 Certainly the jury is allowed to consider that
3 testimony of Dr. Paulus and make those factual findings
4 regarding infringement. Infringement is taking claims, and
5 this Court has done its job, and applying those claims to
6 the accused infringing products.

7 A couple of comments on Mr. Miller's comments.
8 Talk about surprises. I was surprised to learn that he
9 pointed to an image that everyone in engineering knows is a
10 cutaway, showing a portion of a product from Hydro's own
11 manuals, and in our infringement contentions, and saying,
12 well, it only shows three walls, not the four walls
13 required, or it only shows two walls. Obviously that is a
14 surprise to me. We have been talking about this all along
15 for over a year, about what the four frame walls are, and we
16 talked about it in claim construction and we're going to
17 talk about it here today.

18 At the time I put those infringement contentions
19 together, I didn't have hardly any of Hydro's documents.
20 What I did have was an engineering drawing that showed a
21 cutaway, and I don't know if we have that handy, but I think
22 Your Honor knows what I am referring to, where there is a
23 trough and a wall and there are labels pointing to those
24 walls and our infringement contentions to say those are the
25 four frame walls. Everybody knows it is a cutaway. Yes,

1 there are walls off the page. That is all that I had to
2 work with because I only had a couple hundred of their
3 documents at that point in time. That issue was never
4 raised before.

5 As you can see in our model that we put together,
6 the four walls, and so what that picture that we looked at
7 before shows is a cutaway approximately there. It struck me
8 as odd that that argument was first in his presentation.

9 Another thing about Dr. Paulus is it is unrebutted
10 testimony. Why didn't Hydro even take his deposition? They
11 didn't take his deposition. They didn't put on their own
12 expert. They didn't present any testimony of one of
13 ordinary skill in the art. So our view is that under the
14 summary judgment standard, we have got to accept Dr.
15 Paulus's analysis and conclusions as true and the jury is
16 entitled to hear that.

17 Now, if they decide against us, that is fine, but
18 at least a jury is weighing Dr. Paulus and seeing him as a
19 witness, hearing his qualifications, and listening to his
20 analysis, and making their conclusions about whether his
21 testimony supports infringement or not.

22 In addition, obviously this Court has rendered its
23 claim construction. Hydro attempts to take that
24 construction and kind of twist it in certain ways that if
25 you hold one eye closed and stand on one foot you can deduce

1 noninfringement. I have read the Court's claim
2 construction order many times, and in the relevant part to
3 this patent the Court really says the claim language kind of
4 dictates the construction here. It is pretty obvious from
5 the claim language what we're talking about, and certainly
6 the Court added some limitations or added some elaboration
7 on what those claim terms mean. But really, and we'll go
8 through that, but really for the three claim terms of
9 interest here, the Court's construction did not get us very
10 far away from what the claim language itself says.

11 Again, in front of a jury that claim language and
12 this Court's construction and the jury instructions is going
13 to be looked at by the jury and weighed against the
14 testimony presented, weighed against the exhibits that they
15 are shown, and they are certainly going to be able to ask,
16 is this a grate? Is this a frame? Is this a bottom
17 surface? Those are fact questions.

18 There are five disputed elements. Mr. Miller went
19 through them, and I believe he didn't go through a couple of
20 them, but the three main elements that he did go through --
21 again, in the claim construction order, the Court went
22 through a frame, grate and bottom surface and elaborated on
23 what those claim terms mean. Essentially Hydro can't change
24 the words of the claim and the words of this Court's
25 construction, the words that are both used and the words

1 that weren't used that they try to add here today.

2 The first thing I wanted to look at is a couple of
3 pages from one of Hydro's prior demonstrations. This was
4 from a demonstrative at the hearing I believe we had in
5 November in the case. Much like the animation that Mr.
6 Miller showed, which is our animation, this shows the
7 evolution of the Hydropad.

8 First, at the top of the screen they show the
9 early Hydropad. Well, it has the grate. It has got the
10 bottom surface. Okay. You can see the arrows there. There
11 is a lot of airspace in between. Certainly water and debris
12 fall through the open air to the bottom surface.

13 What happens next? The Hydropad 2.0, if you will,
14 and all that changed was that bottom surface was brought up,
15 and those grating portions, those parallel bars that form
16 the grating were welded to that bottom surface, and now you
17 have a two-piece surface that combines the functions, the
18 same functions of what was going on with the first
19 generation above. You can see the cutaway there where they
20 show the two pieces welded together surface that is
21 identical in form and function to the first generation
22 Hydropad.

23 Then the second page is the accused infringing
24 Hydropad 3.0. What has happened here? The only thing that
25 has happened is they have taken the two-piece welded

1 together frame bars with the flat plate under it welded
2 together, and they probably, as a manufacturing improvement,
3 made that one piece. It is a lot simpler to manufacture
4 than having to go in and weld all those frame members to the
5 bottom surface. That is all that changed.

6 Hydro wants you to believe that there was a
7 monumental change in structure and design when that bottom
8 surface was brought up to the frame members. Well, again,
9 how do we look at this in the light most favorable to Riveer
10 on this motion? Well, let's take a look at how somebody
11 might look at it in a light most favorable to Riveer.

12 Next image.

13 At the deposition of Mr. McCormick, which was
14 ultimately Hydro's Rule 30(b)(6) witness and vice president,
15 we talked about this image. This is not the accused
16 infringing design. This is the early Hydro 1.0 design that
17 we looked at in the prior image. You have the rails and the
18 grate, the grating, and then you have open air, and then the
19 water and debris fall through there and you collect it there
20 in the basin. This is before they brought the plating up.

21 What did he say in his deposition? Again, this
22 testimony should be presented to a jury, as we would like to
23 do, and the jury is entitled to believe it. Line 10. I'm
24 talking to him and I am asking him a very simple question.
25 If we brought that up, if we brought that piece of pan up to

1 the underside of the grate, it would still be a grate,
2 right? That hasn't changed; isn't that correct? There is
3 an objection and the witness says all right. I repeat, we
4 would still call it a grate? What does Mr. McCormick say?
5 Yeah. Instead of collecting the water in the pan, it would
6 run off onto the ground or into a gutter, if you put a
7 gutter on there like our patent.

8 I think a jury would agree with me that
9 Mr. McCormick has just told us that there is no structural
10 or functional difference between the Hydropad 1.0 and the
11 Hydropad 2.0. All you have done is you have brought that
12 bottom surface up and it is now welded to the underside.
13 Instead of collecting water in the pan, it would run off in
14 between those grate pieces, the water channels, onto the
15 ground if you didn't have a gutter, or if you had a gutter,
16 it would go into the gutter just like our patent.

17 Mr. Miller mentions Hydro's patents and, of course, we
18 have talked about this in prior motions, but Hydro's patents
19 came after the patent we're talking about today, so the fact
20 that Hydro got patents on its inventions, that is fine and
21 that does not change the fact that a later invention can
22 still infringe an earlier patent, which is the case here.

23 Let's go to that next image.

24 This is an image of a Hydropad and I brought this up to
25 direct the Court's attention to the weight bearing aspect.

1 You may recall in the claim construction and on the
2 infringement issues there is an issue about, well, the frame
3 has to be weight bearing. If you look at this, you can see
4 that not only the frame but also obviously the top surface
5 is intended to be weight bearing. You can see that the
6 cover of the trough can swing over on top of the trough and
7 close and, as you can see in the front and the bottom of the
8 image, there is a ramp and a vehicle can drive up that ramp
9 and be on top of the surface of the wash pad.

10 Well, you can see that that ramp allows the vehicle to
11 drive right over the top of that side trough, right over the
12 top of the grating as well. The whole, entire thing is
13 weight bearing. The grating is weight bearing. The cover
14 on the side trough is weight bearing. The frame members are
15 weight bearing.

16 An important aspect of these products is that there is
17 some heavy stuff on there. There are tanks and there is
18 heavy equipment. If that stuff is turned around or moving,
19 you have to have a structurally integral piece of steel with
20 all four walls and every aspect of that thing welded
21 together so that any type of movement is going to be
22 supported. Weight bearing is certainly one aspect of it
23 that is satisfied in the accused infringing products.

24 If we can go to the animation, please.

25 Obviously in contrast to Mr. Miller, we believe that

1 this video accurately shows the evolution of those Hydropads
2 that I showed you in the other image, the Hydropad 1.0 where
3 the water is filing a basin that is down below the grating,
4 where there is a hinge on the grating to pull it up, so you
5 can't clean it out when there is a vehicle on there, and the
6 water being drained out through a tube fitting.

7 Pause it for just one second.

8 As to that aspect of it, I think it just goes to the
9 credibility of Hydro's arguments when they say that the
10 Riveer patent talks about that design and that design only,
11 that you're not able to clean things out while there is a
12 vehicle on the grate. That is just a mischaracterization.

13 If you look at the patent, and if we could pull that
14 up, column two of the patent itself, line 53, and do you see
15 there line 53, Your Honor? It says right above the 55 there
16 on the right-hand side, it says grate 32 also includes an
17 access panel for easy access to drainage fitting 34 and the
18 inners, and that probably should be innards, innards of
19 modular wash rack 12 in case of blockage or for general
20 cleaning.

21 What is access panel 37? Let's go to figure three.
22 Access panel 37, if you look at the top there, it is that
23 white space. 37 is an access panel where you can get in
24 there and clean out what is there in the gutter, and there
25 is a gutter in the patented preferred embodiment, and clean

1 it out. You can see that there can be anything at all on
2 the grating and it can stay there and it does not need to be
3 removed. So Hydro, once again, is just mischaracterizing
4 the 298 patent.

5 Let's go back to the animation.

6 Obviously here we have got the grating, we have got
7 that bottom surface, and we have got the frame walls, the
8 three key elements that we are here today to talk about in
9 the first generation of the Hydropad.

10 In the second generation, again, that bottom surface is
11 brought up, and now it is welded together to that grating,
12 and the water flows -- pause it here. The animation
13 technology that we used was not able to show it accurately,
14 and I think Your Honor pointed this out last time at the
15 claim construction hearing, that obviously the water flows
16 from the vehicle in between the surfaces of that grating and
17 then that bottom surface is tilted, sloped so that the water
18 then flows down toward that side trough and into that side
19 trough. That is all part of the bottom surface which
20 performs the claim function of collecting the water and
21 debris and ultimately with the drainage fitting down there
22 at the bottom left allows the water to be drained out.

23 Continue, please.

24 Now this 2.0 Hydropad has the side trough but it was
25 not an integral part of the pad. What changed and what

1 caused this infringement claim was the change in the design
2 to the 3.0 in two aspects. One aspect is the integral side
3 trough, which allows that bottom surface to collect the
4 water and debris in between those grating portions, and in
5 the side trough and then draining out through the draining
6 fitting. Then the second aspect, if you let the animation
7 run, is instead of a two-piece grating and bottom surface
8 that are welded together, now we have simply done the
9 manufacturing efficiency of creating it one piece. That is
10 shown by removing that top surface and putting the one-piece
11 corrugated surface that has both the grating as well as the
12 bottom surface, the water channels and the side trough.

13 We have built this model, and I can probably speak loud
14 enough that you can hear me, and may I approach the model?

15 THE COURT: Yes. I can hear you fine.

16 MR. LOBBIN: Certainly if Your Honor is
17 interested, if the Court is interested you can come and take
18 a closer look. The three elements we're talking about here
19 today are the frame, the bottom surface and grating, the
20 grate and then the other two sloped trays and a pump that
21 has a vacuum that we have not talked about really, so let's
22 talk about the first three.

23 This is a model of a Hydropad with a four-wall
24 frame. Again, it is a cutaway. I thought everyone
25 understood early on, and I think in deposition nobody raised

1 the issue that we only pointed to three walls on the
2 cutaway, but I think everyone understood that this is a
3 four-wall frame and that it is weight bearing. You'll
4 notice that it is not just four walls.

5 There was some talk about the area within the
6 frame, and it is also supported underneath because there is
7 heavy equipment going on these things and it has to be
8 supported underneath, otherwise it wouldn't function at all.

9 The bottom surface. Again, the intention of the
10 bottom surface and the purpose of it is to collect the water
11 and debris. Whether this is down a little lower above some
12 grating or whether the grating sits right on top of it, like
13 in the Hydropad 2.0 design, it is still the same bottom
14 surface.

15 In reality this would be sloped, because you want
16 the water to flow not this way but toward the side trough,
17 and then this is a side trough cover that we talked about
18 earlier that is also weight bearing and part of the
19 structure of the surface of the wash pad. It has to support
20 vehicles and people that are walking along here washing
21 equipment.

22 Then, of course, the manufacturing improvement of
23 taking one-piece corrugated, I think they call it, grating
24 bottom surface and the water channels there, again, channel
25 the water and debris towards the side trough.

1 How does that relate to the claims? Well, the
2 frame, the Court said -- well, the claim itself says that
3 the frame has a first, second, third and fourth wall, each
4 wall having an inner and outer surface. I think it is
5 clear, and I could go through taking this apart again, but
6 there are four walls and they are walls and they have inner
7 and outer surfaces. There is four of them and they are
8 interconnected.

9 The Court elaborated on that claim term in the
10 construction. The Court said a weight bearing frame. That
11 is a new twist. It has got to be weight bearing. We think
12 that is consistent obviously with the patent. Under any
13 reasonable interpretation, certainly an interpretation that
14 the jury would be allowed to utilize, these four frame walls
15 have to be weight bearing, in particular the fourth wall, or
16 if you take any of these walls off, this is going to buckle
17 and collapse. These four walls of the frame have to be
18 weight bearing.

19 The Court said the walls have to be interconnected
20 and to define a single enclosed area. Each wall has an
21 inner surface facing toward the enclosed area and an outer
22 surface facing away from the enclosed area. That is the
23 balance of the Court's construction. So interconnected,
24 single enclosed area, and certainly interconnected, and the
25 single enclosed area. I don't think Hydro is contending

1 that it has to be an empty enclosed area. Certainly there
2 are support members underneath here for structural support,
3 and certainly there is a side trough here, so the enclosed
4 area is the area within the frame.

5 It is also consistent with the function of these
6 devices. It is like the Continental Divide. Everything on
7 one side of the Divide flows the same way, toward the
8 Atlantic Ocean or the Pacific Ocean. These wash pads are
9 designed such that anything that comes within these four
10 frame walls is going to eventually get down here, and if it
11 is liquid, out through the draining fitting, and if it is
12 solid, it is going to be scooped out or otherwise taken out.
13 The whole point of this thing is to have a four-wall
14 enclosed area, and anything that falls anywhere in here is
15 going to eventually flow down through this bottom surface
16 and these water channels to the side trough and out through
17 the drainage fitting. That is the whole point. That is
18 consistent with the Court's claim construction of a single
19 enclosed area.

20 How did the Court explain its construction? Well,
21 the Court said that the claim language itself tells us that
22 it is weight bearing and interconnected and a single
23 enclosed area. We don't disagree with that. We think the
24 claim language itself also is consistent with how this
25 patent should be interpreted and how it should be applied.

1 We think the jury, sitting with a jury instruction that has
2 the claim language and has the Court's interpretation as I
3 just said, with Dr. Paulus's analysis and the evidence, in
4 the light most favorable to Riveer here, has to be able to
5 come to the same conclusion I'm coming to right now.

6 The bottom surface. The claim element is a bottom
7 surface extending between the inner surfaces of the first,
8 second, third and fourth walls, to define a basin for
9 collecting water used to clean the item as well as any
10 debris removed from the item. Well, the Court, again, in
11 the first sentence of its claim construction analysis, the
12 Court said the claim language itself compels the Court's
13 construction. In order to define a basin for collecting
14 drainage, the bottom surface must be located on a lower
15 portion, though not necessarily the lowest portion, and the
16 Court italicized lowest, of the frame walls.

17 So where is the bottom surface? It is the lower
18 portion of the grate. Well, obviously the vehicle is here.
19 The vehicle is flush with the four frame walls. That is one
20 elevation, if you will. The bottom surface, certainly in
21 the Hydropad 1.0 and prior designs years and years ago, yes,
22 the bottom surface was way down near the ground. The
23 Court's construction is that the bottom surface has to be at
24 a lower portion but not necessarily the lowest portion of
25 the area between the four frame walls. Clearly the whole

1 point of the invention is served with this bottom surface is
2 the water channels in between the grating and that is the
3 lower portion. Defining a basin for collecting water and
4 debris. Obviously the whole point of these water channels
5 and the side trough is to collect water and debris. It is a
6 simple explanation and the jury is entitled to rule in
7 Riveer's favor on that.

8 The grate. The Court construed grate to be a
9 porous framework. The word porous was not in the claim.
10 The Court agreed with Hydro's proposal and said, okay, the
11 grate has to be porous and it has to be a framework of
12 parallel or crossed bars that fills a horizontal cross
13 section of the enclosed area and engages the top portion of
14 the inner surfaces of the frame walls.

15 How did the Court explain its construction? Well,
16 in part the Court said of course a grate -- of course was my
17 editorialization -- the Court said a grate that does not
18 allow debris to pass through the grate into the basin would
19 render the bottom surface irrelevant, inoperative is the
20 Court's word, mere surplusage.

21 So the point of saying that it is porous is that
22 the Court wanted to make sure that we are not talking about
23 a flat surface. You could use a flat surface, and some of
24 these products are designed with a flat surface on top where
25 the water just kind of goes wherever gravity will take it

1 and is swept off, but the way I read what the Court said
2 here was that, look, the grate has to be a porous framework
3 of parallel or crossbars to assure that the grate is not
4 collecting any water, and the grate is not allowing any
5 water to be collected. The grate is supporting the vehicle
6 and providing an elevation on which the vehicle rests, and
7 allowing the water and debris to sink to that bottom surface
8 so that it can be collected and channeled to where it needs
9 to go.

10 If you're going to do a flat grate or a flat
11 surface on which the vehicle rests, you are not going to
12 infringe this patent. That is not what we're talking about
13 here. Consistent with the Court's construction, the
14 analysis that we have provided both in my attorney argument
15 here and, more apparently, in Dr. Paulus's explanation, is
16 entitled to be weighed by a jury.

17 In addition, to go back to, and without pulling it
18 up, the deposition testimony because I think that is
19 critical. The jury is going to be entitled to listen to
20 Mr. McCormick sit here and talk about how a grate is a grate
21 is a grate. Hydropad 1.0, Hydropad 2.0, so what happens,
22 Mr. McCormick, when you bring the plate up? Is it still a
23 grate? Yeah. It just does not fall through. It is
24 directed to the sides. What do you think a jury is going to
25 think about that testimony? A grate. That is a grate. Of

1 course they are entitled to hear Dr. Paulus as well.

2 I'm tempted to go through pump and a vacuum and
3 the slope tray, but I'm going to exercise discretion is the
4 better part of valor and say that Dr. Paulus has provided a
5 thorough analysis of those elements and I think he is
6 entitled to be relied on, as well as the arguments that we
7 made in our briefs, since it was not addressed by Mr.
8 Miller.

9 Thank you, Your Honor. I have asked Mark Ford to
10 clarify anything that I may have missed, if that is
11 acceptable.

12 THE COURT: It is.

13 MR. FORD: I have nothing further, Your Honor.

14 THE COURT: Thank you.

15 Mr. Miller, any reply?

16 MR. MILLER: I want to address a few things, Your
17 Honor.

18 First of all, there is plenty of case law that
19 allows summary judgment on noninfringement. There is no
20 dispute what the structure of Hydro's product is. When the
21 accused product, the structure of it is undisputed, then
22 what the Federal Circuit has said over and over again is
23 that it collapses to claim construction and it is addressed
24 as a matter of law. There is no more a question of fact at
25 issue.

1 It has got to be based on the evidence of record.
2 This is not evidence. This is not evidence in the summary
3 judgment record. Mr. Lobbin's narration of what he thinks
4 Hydro's product development progression is is not evidence.
5 He is not even correct on it. He does not point to
6 testimony or documents to support his narration of what
7 Hydro does. That is not in the summary judgment record.

8 He also said that when he did his contentions, he
9 didn't have all of Hydro's documents. Well, every document
10 that he points to in their final infringement contentions,
11 and even in their amended final infringement contentions, he
12 had at the beginning. He hasn't gotten anything new. He
13 even took an early deposition of Mr. McCormick in April for
14 the purpose of getting the information that they need for
15 infringement contentions.

16 The one thing I do want to clarify is he made a
17 point about Dr. Paulus and said why hasn't Hydro deposed
18 him. As soon as we got Dr. Paulus's affidavit we asked to
19 take his deposition. We asked over and over again. I mean,
20 we almost begged to take his deposition. We offered during
21 the month of -- it was either February or March when this
22 was going on -- we offered at least 14 different dates
23 within a three-week window that we would be available to
24 take his deposition and they said you can take his
25 deposition on this one day, which our team was not

1 available, or nothing. That is it.

2 Then after the Court scheduled the first hearing,
3 the claim construction hearing, I sent Mr. Lobbin an e-mail
4 and said in light of the hearing and when it has been
5 scheduled we would like to take his deposition. It looks
6 like we have more time. We propose these dates. I gave him
7 four alternatives. He did not even respond to that e-mail.
8 I got no response to that e-mail.

9 We have not been allowed to depose him, but we
10 don't need to because you can take his affidavit for what it
11 is, and we presented case after case after case in our
12 briefing where courts disregard conclusory expert testimony
13 at the summary judgment level. Just putting it in the
14 record does not give you the right to get to trial. If it
15 did, summary judgment would disappear in patent cases. You
16 can always find an expert who will stand up and say that
17 performs the same function in the same way for the same
18 result, period. Now we get to go to trial. That is not how
19 the law works.

20 The one piece of evidence Mr. Lobbin talked about
21 was Alan McCormick's deposition, where he claims
22 Mr. McCormick says that the Hydropad has a grate. I want to
23 look at that testimony.

24 Sherry, go to 204, docket 204-2. It might be
25 Exhibit 2. Yes. Do you have that in there? Okay.

1 Let me go through it. It is Exhibit 2 to
2 Mr. Lobbin's declaration that they submitted. If you read
3 the transcript they give of Mr. McCormick's deposition, they
4 are pretty selective on their highlighting. On one of the
5 pages Mr. McCormick says I understand if I had those rails
6 mounted on a solid surface, talking about bringing that up
7 and hooking them to the rails, nothing would go through that
8 solid surface. He says that. Mr. Lobbin says and if you
9 tilted it, water would flow off. Alan nods his head.
10 Mr. Lobbin said it would still be a grate, correct? It
11 would just now have a tray attached to the other side of the
12 grate. Mr. McCormick says I don't believe that it would at
13 that point be a grate. That is pretty clear. It would not
14 be a grate.

15 Then on the next page they go through and
16 Mr. Lobbin keeps pushing, well, we put it up there and we
17 hook it onto the channels and he says I am asking you a very
18 simple question. If we brought it up, if we brought that
19 piece of pan up to the underside of that grate, it would
20 still be a grate, right? That has not changed; isn't that
21 correct? I objected. The witness said okay. Mr. Lobbin
22 said we'd still call it a grate. Then Alan says, yeah, and
23 instead of collecting water, it would flow across the top.

24 Look at Mr. Lobbin's question. We'd still call it
25 a grate. How is that an admission that Hydro would call it

1 a grate? Mr. Lobbin said we'd still call it a grate, him
2 and Petter. If I was Mr. McCormick, I would say, yeah, you
3 guys will call anything a grate. That is not an admission
4 that proves anything about what is and is not a grate.

5 Really that issue comes down to claim
6 construction, which is now settled, that it is a porous
7 structure, which we don't have here.

8 I want to talk a little bit about this model. One
9 thing to clarify is this model does not simulate their
10 infringement contentions. It does not. It is even contrary
11 to their amended infringement contentions that they are
12 seeking to introduce. Here is one reason. Their
13 infringement contention point, and I don't know how you guys
14 take out this blue surface, okay, but we gave them documents
15 that they had that showed that there are frame walls in a
16 Hydropad, and this is not exactly a Hydropad at all, but
17 let's just go with their assumption.

18 They say element two, in their infringement
19 contentions element two satisfies the frame walls. They
20 have got to point to four. They have got to be specific
21 enough and not make us go hunting for, well, what if they
22 picked these walls to be the four or these walls? They have
23 to say that these are the four that we are relying on to
24 satisfy the four in our claim. They pointed to these walls
25 of the trough, this wall on the front, and that is it, the

1 trough walls and this wall. They did not point to all of
2 these outer walls of the frame. They did not do that in
3 their infringement contentions. They didn't do it in their
4 finals and they didn't even do it in the amended ones in
5 their motion. Those arrows point here and here and here and
6 here. That is all they do. We are supposed to divine their
7 positions, and I feel like I'm hearing new positions here
8 today.

9 Now, the next thing that does not equate to their
10 infringement contentions is the concept of the bottom
11 surface. When they point in their infringement contentions
12 to a bottom surface, they point to these grooves. That is
13 it. But now they want to say, and they keep making these
14 bottom surfaces in this little video they made and in this
15 to include this little part that goes into the trough. They
16 have never alleged that to be a bottom surface and it is
17 not.

18 The other irony is the claim says bottom surface
19 and bottom means something, and they propose the definition
20 of bottom as the lowest part of something. The Court's
21 construction says the bottom surface engages the four
22 sidewalls at the bottom portion of the sidewalls. They
23 still feel comfortable standing up here and saying, well, we
24 have brought this all the way up to the top of these walls,
25 if you can call this upper one-eighth portion of the wall

1 the bottom portion of the wall. I mean, that is such a
2 stretch, but they still say if you bring it up to the top,
3 it is still a bottom surface. Top is bottom and up is down.
4 This is such a backwards patent infringement allegation.

5 This little model that they have made, this is not
6 evidence. The other thing that they don't have evidence for
7 is, I heard Mr. Lobbin say, look, this frame or this trough
8 he just says, without pointing to any evidence, that it is
9 weight bearing. You can drive a car on that. It happens
10 all the time. I don't know where he is getting that from.
11 There has been no witness testimony to say that. There is
12 no evidence to support that. He can't just say it is weight
13 bearing. If you rely on the evidence in the summary
14 judgment record, they cannot prove infringement as a matter
15 of law. All of the evidence giving them every inference
16 they are entitled to, you cannot find a grate on four
17 sidewalls that form a basin with a bottom surface, and you
18 cannot find that combination in a manner that satisfies the
19 arrangement in the claims in the Hydropad products. It
20 can't be done.

21 As a matter of law, there is no infringement and
22 there can't be a doctrine of equivalents infringement,
23 because they have not satisfied their burden to have linking
24 testimony and evidence explaining how it is substantially
25 similar. Dr. Paulus's testimony is unreliable. It is

1 conclusory and it wouldn't support a reasonable verdict of
2 infringement.

3 Thank you.

4 THE COURT: Mr. Lobbin, please.

5 MR. LOBBIN: Thank you. Thank you for the time,
6 Your Honor.

7 There are so many issues that I don't know where
8 to start. I am reminded, and I think it was Shakespeare, me
9 thinks thou dost protest too much. When somebody argues so
10 vociferously, it must be true what they are arguing against.
11 This is so simple. This is evidence. This is a
12 demonstrative of all the documents that are in the record
13 that they produced. The jury is entitled to look at it and
14 rely on it. Hydro is trying to elevate form over substance
15 to convince this Court otherwise, and I think the Court has
16 to keep in mind the perspective of a juror, which obviously
17 the Court is equipped to do on summary judgment. What is a
18 reasonable jury going to be allowed to conclude based on the
19 evidence?

20 Some of the form over substance things, the Dr.
21 Paulus deposition, I don't even know where to go with that.
22 I don't know what he is referring to about an e-mail. Maybe
23 I didn't get the e-mail.

24 THE COURT: How do you respond to his claim that
25 you claimed in your submissions to this Court that they rely

1 on that the four walls were as he illustrated in his opening
2 remarks, and that you have changed that four-wall contention
3 today?

4 MR. LOBBIN: Well, that is just not true. As I --

5 THE COURT: I don't know who is right, and I am
6 going to have to do some digging, but he says very clearly
7 that you have got that black wall, the long one as one wall,
8 and then you have got the trough forming the other three
9 walls.

10 MR. LOBBIN: Yes.

11 THE COURT: That was your contention in your --

12 MR. LOBBIN: Pull up the contention drawing. It
13 is in the Paulus declaration, page 9.

14 THE COURT: Before you turn to something, you two
15 seem to be saying a different thing. He says your
16 contention was as I have just described it, and when you
17 stood up to that demonstration item there on the table, you
18 seemed to be pointing to the four black walls surrounding
19 the entire structure.

20 MR. LOBBIN: Yes.

21 THE COURT: Well, it is your contentions, so I'm
22 just asking what your contentions --

23 MR. LOBBIN: Yeah. I --

24 THE COURT: Is it the four black walls surrounding
25 the entire structure or is it as he represented? Help me

1 with that.

2 MR. LOBBIN: Our contention has been for a year or
3 more, since we first put our contentions together, was that
4 the four frame walls are satisfied by one, two, three, four,
5 and --

6 THE COURT: And that is what you demonstrated to
7 me today.

8 MR. LOBBIN: This could be four or this can be
9 four. They both work. That is our contention. One, two,
10 three, four. Four prime, if you will. That is our
11 contention. I will show you what we contend. To any normal
12 engineer, and I would challenge Hydro to tell this Court
13 with a straight face as engineering graduates, and any Hydro
14 employee who is willing to say this, and I doubt they would,
15 that this drawing that you're looking at, this is an
16 engineering drawing -- a drawing from Hydro's technical
17 manual which is supposed to educate their customer or anyone
18 interested in Hydro's products, what is the structure of the
19 Hydropad? Well, obviously this is what is known in
20 engineering, as any first year engineer would know, it is a
21 cutaway drawing, okay, which means that there is stuff to
22 the left of that drawing. What is to the left of that
23 drawing? All of the rest of this. Right?

24 Any engineer would know that when you look at that
25 drawing, there are two more walls off the screen, if you

1 will, and so when we're pointing to the walls, the frame,
2 we're pointing to three of those walls. Where are the other
3 two walls? They are here and here. They are off the
4 screen. Had I had a better document, and I didn't because
5 Hydro didn't produce it, I would have had arrows pointing to
6 those two walls. Any engineer knows and Hydro knows and
7 Riveer knows and anyone with rudimentary skill in any
8 engineering art knows that this is a cutaway drawing.

9 THE COURT: Well, somehow you apparently didn't
10 convey that to your opponent so that they --

11 MR. LOBBIN: We talked about it all throughout the
12 case, and in the deposition of Mr. McCormick, and I can go
13 back through the transcript and we talked ad nauseam about
14 the four frame walls. The claim says four. Obviously any
15 normal person reading that would say, okay, the four frame
16 walls are these that he is pointing to and the other two off
17 the screen. We are all engineers in this game. We know
18 this. To try to convince the Court otherwise that, oh, we
19 didn't know what they were contending, that strains
20 credulity.

21 THE COURT: Where is it that you ever told them
22 that the four walls can be the outside walls, and also three
23 of the outside walls and the inside of the trough wall?

24 MR. LOBBIN: In our opposition brief to this
25 motion, which was filed in December or early January. That

1 is where we elucidate it more. What I just showed you tells
2 them, and what we briefed explains it specifically, and in
3 our opposition brief and in Dr. Paulus's analysis and it is
4 obvious. It is explicit. If we can pull up --

5 THE COURT: I am reading now the --

6 MR. LOBBIN: Yes.

7 THE COURT: -- can be the outer wall of the side
8 trough or the inner wall of the side trough. Both of these
9 walls are part of the frame.

10 What do you say to that, Mr. Miller?

11 MR. MILLER: Your Honor, Dr. Paulus's declaration
12 is not their infringement contention. If they introduce
13 this concept for the first time, and they did it for the
14 first time in response to our summary judgment motion,
15 rather than introducing it in the contentions so that we
16 were prepared for it.

17 Now, as a matter of result, it does not matter
18 which walls they point to. They still can't meet bottom
19 surface and grate in this case and there is no infringement.
20 The idea that they have conveyed this prior to -- ambushing
21 us with a whole new infringement contention in their expert
22 declaration in response to summary judgment, that is what
23 happened.

24 THE COURT: Wasn't the response to summary
25 judgment done some time ago?

1 MR. LOBBIN: Months.

2 MR. MILLER: Yes, and it was also done months
3 after their final infringement contentions, and they are
4 bound to their final infringement contentions. They are not
5 allowed to change their infringement contentions via summary
6 judgment.

7 MR. LOBBIN: Your Honor, the local patent rules
8 are new here, but they are consistent and in our motion that
9 we were going to talk about today, but we'll talk about
10 soon, the local rules specifically say, consistent with the
11 Federal Circuit case law, that the infringement contentions
12 are subject to amending to be consistent with the evidence,
13 just like in any normal expert type analysis or anything
14 else, and once the Court renders its claim construction, in
15 particular, and that is a hallmark of a stage of a patent
16 infringement case. So I think it is, look, this was months
17 ago, we explained it in opposition to summary judgment, and
18 their contention that they didn't have notice of any of this
19 stuff, and we talked about it in deposition a year ago, and
20 this is not difficult technology. It is very simple
21 technology. Four frame walls. We all understood that.

22 Your Honor, if they really were confused, which I
23 doubt they were, they could have just called me up and said
24 what do you mean? You're only pointing to three things.
25 The claim requires four frame walls. Where are the other

1 two frame walls? I am not sure that we didn't have that
2 conversation, but they could have just said you have got
3 three arrows, and the claim says four frame walls, where are
4 your other two frame walls? They didn't do that.

5 Talk about ambushing, this is an ambush by them
6 against us trying to say your contentions were confusing and
7 we don't know what you were talking about. It is like a
8 Saturday Night Live skit.

9 Paulus -- they take potshots at Paulus. Guess
10 what? Dr. Paulus went to Oklahoma and spent a whole day
11 examining Hydropads, took pictures and did analyses. They
12 make it sound like we hired an expert to come in and just be
13 a mouthpiece and spend a half an hour and make a couple
14 hundred bucks to sign a declaration. That is not what we
15 did. This is an expert that is helpful to the jury, more
16 helpful than me and certainly more helpful than Mr. Miller,
17 in explaining how the infringement analysis should go. He
18 is a person of ordinary skill in the art. He can testify
19 and he has percipient knowledge of these products, and his
20 examination of the products, and he spent a lot of time
21 doing the analysis of infringement based on the law and
22 based on the technical characteristics of the accused
23 infringing products. That attack on him is not apropos.

24 Mr. McCormick's deposition -- certainly if Hydro
25 wants to present testimony at trial that is different from

1 what he said in his deposition, that is fine and the jury
2 can weigh that, but that is a jury issue. It also strains
3 credulity a little bit to say that -- pull up the
4 testimony -- that my question was meaning to say that we,
5 like we Riveer, could call that a grate. Really? If he
6 says that on the stand, nine out of ten jurors -- maybe one
7 would agree with Hydro's interpretation. He says, yeah, we
8 would still call it a grate. Well, if you look at lines 17
9 and 18, and that is what Mr. Miller wants to focus on, we'd
10 still call it a grate, so he is saying that a jury looking
11 at that question would say what I'm really saying there is
12 we, like me and Riveer, in an antagonistic fashion, we'd
13 call that a grate. So what he is agreeing with is that he
14 is saying, yeah, you would call that a grate. Then he goes
15 on to explain exactly what I'm trying to get him to admit.

16 That is not how the real world works. If you look
17 at lines 12 and 13, I say it would still be a grate, right?
18 That hasn't changed; isn't that correct? All I'm doing on
19 17 and 18 is restating the question. Mr. Miller wants to
20 focus on the word we, but I think any reasonable juror, and
21 certainly on summary judgment we have to look at this
22 testimony, and we have to construe it in the light most
23 favorable to Riveer, and if we are going to do that, then
24 certainly it is an admission. He is admitting that there is
25 no structural or functional difference. We just brought the

1 pan up and we welded it down and it is the same structure
2 and it works the same way.

3 THE COURT: Well, that seems complicated. It
4 seems like the argument that you just made would support one
5 for a doctrine of equivalents argument, and I'm just
6 wondering how it works when a court has construed grate as
7 porous, and we have -- what is the guy's name again? I'm
8 getting the names mixed up.

9 MR. MILLER: Alan McCormick.

10 THE COURT: We have Mr. McCormick answering one of
11 your questions, and it sounds like he answered it
12 differently earlier, and Mr. Miller objected, asked and
13 answered, where he was not agreeing with you that it was a
14 grate, at least from what I listened to just a few minutes
15 ago, and then you said we still call that a grate and you
16 get him agreeing with you in a deposition, but it was not
17 focusing on whether the thing in question was porous, was
18 it? How does that work when I'm deciding whether there is
19 literal infringement? I don't have Mr. McCormick agreeing
20 with a question by you or anyone that this was porous. That
21 is certainly relevant and --

22 MR. LOBBIN: Well, I suppose that we would have to
23 put ourselves in the mind's eye of actually sitting here at
24 trial and hearing that exact testimony, and --

25 THE COURT: Would it be relevant, if the jury is

1 told in a jury instruction, as we know they will be, how the
2 Court has construed the claim and it focuses on whether it
3 is porous, and I am not ruling now on whether it would be
4 entirely irrelevant, but I'm not sure how relevant it is to
5 today's argument on summary judgment.

6 MR. LOBBIN: Well, it is entirely relevant because
7 he explains what he is talking about. He says instead of
8 falling through, it would flow across. The question on
9 porous would be that the Court's claim construction is that
10 a grate is a porous surface, and --

11 THE COURT: You just used the words falling
12 through. Perhaps the Court needs to now define what porous
13 means.

14 MR. LOBBIN: Well, we are dealing with the English
15 language so it is always imprecise, but --

16 THE COURT: In your own patent specification it
17 used the phrase falling through.

18 MR. LOBBIN: In the specifications. In the claim
19 it says flowing into, and the claim language has not
20 changed.

21 THE COURT: Right. You will remember in your
22 preferred embodiment or the specification, it uses the words
23 falling through.

24 MR. LOBBIN: Yes.

25 THE COURT: Okay. All I'm saying is when I

1 construed it as porous, I had in mind something that allowed
2 water and debris to fall through.

3 MR. LOBBIN: Right. We would argue to a jury
4 that --

5 THE COURT: Although I didn't say that in my
6 construction. I see now that I just said a porous framework
7 with parallel crossbars that fills a horizontal cross
8 section of the enclosed area and engages the top portion of
9 the inner surfaces of all four frame walls.

10 MR. LOBBIN: Correct.

11 THE COURT: Do you contend and is your contention
12 that the question you asked to Dr. McCormick, and is it your
13 position on the Hydro device that it is porous in that it
14 allows water to flow into those grooves?

15 MR. LOBBIN: Yes, just like a sponge. If you put
16 a sponge on the table, it has got pores, right, like the
17 pores on our face, and the pores of the sponge allow --

18 THE COURT: Well, that is different. It goes
19 through the sponge and its pores, but how is there water
20 falling through anything?

21 MR. LOBBIN: We would present to the jury --

22 THE COURT: I am admitting that I didn't put
23 through in the construction, but that seems to be an issue.
24 I don't know how you can have something porous if you don't
25 have water falling through it.

1 MR. LOBBIN: Just like a sponge. The water
2 doesn't always go all the way through. It --

3 THE COURT: I am not agreeing with you on the
4 sponge. Into. With the sponge, water is at least flowing
5 through the top of the sponge and going into the sponge.
6 Here in this metal framework there is no water seeping into
7 anything or falling through anything, is there?

8 You may disagree with my claim construction, but
9 porous has to mean porous, that it has pores that allow
10 water to fall through it.

11 MR. LOBBIN: We would argue at trial that --

12 THE COURT: You would tell the jury porous does
13 not mean --

14 MR. LOBBIN: We would say that this surface is
15 porous because the vehicle is resting on the surface, on the
16 grating, and the water is falling through that grating
17 surface, through and into, as the claim requires --

18 THE COURT: That seems to be a stretch. A
19 corrugated roof is porous?

20 MR. LOBBIN: Well, I don't disagree that porous
21 was not the --

22 THE COURT: That was the notion behind my
23 construction of porous.

24 MR. LOBBIN: Well, metal would never be porous in
25 that situation, because porous is a --

1 THE COURT: Exactly.

2 MR. LOBBIN: Okay.

3 THE COURT: I'm just wondering how you can argue
4 literal infringement to a jury --

5 MR. LOBBIN: Well --

6 THE COURT: -- on the porous nature of that
7 device. It is porous in that it lets water run into a tray,
8 a tray at the end, right? That is pretty much your
9 contention.

10 MR. LOBBIN: Well, I'm not denying that we would
11 need some elaboration on porous. Now, claim construction is
12 done and that claim construction would be put in jury
13 instructions, and it would be up to the jury to use their
14 knowledge to --

15 THE COURT: That is what I was saying earlier.
16 That gets complicated.

17 MR. LOBBIN: It is complicated. That is why we
18 need a jury.

19 THE COURT: I would disagree. The jury should
20 have a clear understanding of what the Court's words mean
21 when we tell them this is what the claim means, not just
22 invite another semantic argument with the jury. They should
23 have some clear understanding of what the claim means.

24 MR. LOBBIN: Riveer didn't propose porous. Hydro
25 proposed porous and the Court adopted the word porous for

1 its construction, so what we have now is we have to analyze
2 what the Court said in its construction, and what the Court
3 said was that to not allow debris to pass through the grate
4 into the basin would render the bottom surface meaningless.
5 So reading the Court's explanation of what it provided for
6 its claim construction, we took that and said, okay, how
7 would we argue to a jury based on this jury instruction --

8 THE COURT: That it would have to pass through.

9 MR. LOBBIN: Pardon?

10 THE COURT: That it has to pass through.

11 MR. LOBBIN: Pass through the grate, yes, and into
12 the basin. Just like the old style Hydropad 1.0, the basin
13 is way down at the bottom, so from the level of the grate
14 the water is going in between the bars. It is going in
15 between, through, into, and the only difference is where
16 that pan is. Well, that does not affect the grating. It
17 has nothing to do with the grating.

18 If the grating was a creature, and I'm looking at
19 the world from the level of the grating, I don't care where
20 that bottom surface is. I don't even know where it is. All
21 I know is that the water is going through there, through me
22 and my buddy to the left and my buddy to the right, my
23 parallel bars.

24 THE COURT: Now that was Saturday Night Live.

25 Buddy?

1 MR. LOBBIN: If I'm this bar and I am sitting
2 there and I have a piece over there and a piece over there,
3 and there is water coming down, it is going through because
4 the grating over here -- bye water. I don't care if it goes
5 all the way to the bottom or if it goes right here. To me
6 it is going through. The jury would be entitled to draw
7 that same conclusion, especially when we look at how this
8 thing is supposed to perform and what it is supposed to do.

9 THE COURT: Now you're moving into doctrine of
10 equivalents talk, aren't you?

11 MR. LOBBIN: Well, yes. A literal infringement
12 argument is not devoid of context, but, yes, I agree with
13 you that when you're talking more specifically about
14 function, way, result, yes, you get more into is this
15 performing the same function in the same way to achieve the
16 same result as the claimed invention.

17 THE COURT: Not that it ends the argument, but you
18 certainly resisted my adopting porous from their
19 contentions. If you satisfied porous, I guess that didn't
20 matter much to you.

21 MR. LOBBIN: Well, no, we --

22 THE COURT: In resisting it, it seemed like you
23 were disagreeing that the requirement of its being porous
24 should be added.

25 MR. LOBBIN: We just didn't think it was helpful.

1 The claim language speaks for itself in our view and that is
2 why we proposed the claim constructions that we did.

3 THE COURT: Well, it speaks for itself as long as
4 you get to say what it means. That is why you like it, it
5 seems to me.

6 MR. LOBBIN: I'm not going to deny that most
7 patent cases that turn on claim construction have a
8 plaintiff who says, well, the claims mean what they say and
9 the jury is capable of --

10 THE COURT: That is why it was helpful to me to at
11 least have a submission rather than just a comment that it
12 speaks for itself.

13 MR. LOBBIN: Understood. Typically in my
14 experience the defendant is the one championing their view
15 of how all of these things should be elaborated and --

16 THE COURT: All I'm saying is that when they did
17 championing their point of view that it requires a porous
18 framework to allow water to fall through and into a basin
19 below. You recited that pretty vigorously.

20 MR. LOBBIN: Well, I am kind of easygoing, so I
21 don't know how vigorous it was, but we just thought it was
22 unhelpful. Look, we're a plaintiff and we wrote the patent.
23 You have a duty to write patent claims that speak for
24 themselves. You don't write patent claims with an eye
25 toward, well, later we can figure out what this really

1 means. We wrote the patent claims to mean what they said,
2 and --

3 THE COURT: You claim it did not mean porous, but
4 now you claim it was porous, that their alleged infringing
5 device is porous?

6 MR. LOBBIN: Well, we never argued that it was not
7 porous. We just said that the claim language was enough.

8 THE COURT: Did not require it to be porous. All
9 right.

10 What else do you have?

11 MR. LOBBIN: If I may, the claim language without
12 construction says a grate allowing water and debris to flow
13 into said basin. Just that phrase we thought was enough.
14 Frankly, I don't know that we disagree that it wasn't
15 porous. I think we said a grate that allows water and
16 debris to flow into said basin. If you want to call that
17 porous, fine, but that is what the claim requires.

18 THE COURT: I understand.

19 MR. LOBBIN: Unless Your Honor has further
20 questions --

21 THE COURT: I don't have any more right now.
22 Thank you, Mr. Lobbin.

23 MR. LOBBIN: Thank you.

24 THE COURT: Did you have anything else that you
25 wanted to say before we adjourn, Mr. Miller?

1 MR. MILLER: Nothing further, Your Honor.

2 THE COURT: All right. Now, what about this
3 pending motion? Do you want oral argument on that? What do
4 you want to do on the motion of the plaintiff to request
5 leave of court to serve amended final infringement
6 contentions? In light of today's discussion, and I have not
7 read your brief yet, and I got it literally just before I
8 was walking down here to start this hearing, so tell me what
9 you want to do on that.

10 Do you want oral argument? Do you want me to
11 decide it on the briefs?

12 MR. LOBBIN: I think we would prefer argument, if
13 the Court is inclined.

14 THE COURT: I am at a disadvantage. I don't know
15 enough about their opposition now to know whether it would
16 be helpful or not.

17 Do you want oral argument on it?

18 MR. MILLER: I don't think it needs oral argument,
19 but if they want oral argument --

20 THE COURT: All right. When do you want to do it?
21 I can read it quickly. Do you want to do it later this week
22 or next week?

23 MR. LOBBIN: I was just checking to see if we had
24 a reply.

25 THE COURT: You have not replied.

1 MR. LOBBIN: We just got the opposition, what, a
2 couple days ago?

3 THE COURT: Do you want to submit a reply brief?

4 MR. LOBBIN: I think so.

5 THE COURT: Okay.

6 MR. LOBBIN: It kind of expanded it, and the
7 motion was short, but --

8 THE COURT: This was dated the 27th. What is
9 today, the 29th?

10 Do the ten days run from when they receive it or
11 from when it was dated?

12 MR. MILLER: When it was filed. We e-filed it
13 on --

14 THE COURT: You get ten days from the 27th.

15 Mr. Ford, what have you got there? What does that
16 give you until?

17 MR. FORD: Monday the 11th, is that right?

18 THE COURT: Monday the 11th. Do you want me to
19 set an oral argument date right now?

20 MR. LOBBIN: I think we are open to that.

21 THE COURT: Okay. Ron, why don't you see when we
22 can do it.

23 21 May.

24 MR. FORD: Your Honor, just briefly, I failed to
25 include the three days, so actually our due date for the

1 reply brief would be the 14th, Thursday.

2 THE COURT: All right. On the 14th the reply
3 brief is due, and then we'll hear oral argument on the 21st.

4 What time, Ron?

5 THE CLERK: 2:30.

6 THE COURT: 2:30 p.m.

7 Ron is telling me that it would work better for me
8 if we did it on the 22nd.

9 What time on the 22nd, Ron? Is that Friday?

10 THE CLERK: 11:00 on Friday, the 22nd of May.

11 THE COURT: Did you all sort out when their brief
12 is due? Mr. Miller? Mr. Lobbin?

13 MR. MILLER: That is fine.

14 THE COURT: Did you sort out when their brief is
15 due?

16 MR. MILLER: I will let them guess and we'll see
17 if it is timely after the fact.

18 MR. FORD: We'll go check the rule and --

19 THE COURT: Let's say it is due on the 15th. You
20 said the 14th.

21 MR. FORD: I said the 14th.

22 THE COURT: I will go with the 14th.

23 MR. MILLER: Okay. That is an extension.

24 THE COURT: Well, I don't know if it is or isn't,
25 but you have got until the 22nd.

1 MR. MILLER: If the hearing is not on the 22nd, it
2 does not matter, I guess.

3 THE COURT: Right. That is what I thought. I
4 will decide arbitrarily what they say we do. Okay.

5 Anything else today before we adjourn?

6 Thank you for your arguments. They were very
7 helpful.

8 We'll be in recess.

9 (Proceedings concluded.)
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